Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
National Cable and Telecommunications	)	
Association Petitions for	)	**WC Docket No. 11-118**
Declaratory Ruling or Forbearance	)	
With Respect to Section 652 of the	)	
Communications Act Concerning Cable	)	
Acquisitions of Local Exchange Carriers	)	
	)	

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom) submits these Reply Comments with respect to the petitions filed by the National Cable and Telecommunications Association (NCTA) requesting the Commission issue a declaratory ruling or, in the alternative, forebear from certain requirements of Section 652 of the Communications Act.

In short, NCTA argues that there is no pro-competitive purpose served by the additional procedural and substantive requirements set forth in Section 652 for transactions involving the acquisition by a cable company of a competitive local exchange carrier (CLEC) operating within its franchising area. NCTA seeks elimination of these requirements including the requirement of Section 652(d)(6)(B) that allows for the Commission to waive each of the cross-ownership restrictions of Section 652 only if the relevant Local Franchising Authority (LFA) approves of such a waiver.[1]

---

[1] *See* 47 U.S.C. §652(d)(6)(B). In the event the Commission does not grant its requests to eliminate these requirements, NCTA requests that the Commission issue rules establishing procedural and substantive guidelines for LFA review of waiver requests. Given the competitiveness of broadband markets and the federal policy favoring deployment of broadband networks, USTelecom agrees with NCTA that LFAs should not have "unbounded discretion" in this area.

Because the marketplace for broadband services is highly competitive, USTelecom agrees with NCTA that artificial barriers to the efficient operation of the marketplace, such as those in Section 652 of the Act, are unnecessary and usually counterproductive. At the same time, because cable-CLEC combinations of the sort contemplated by the petitions will implicate other artificial regulatory entitlements, it is essential that the Commission address all such impediments to efficient competition in any order it might issue on NCTA's request. In particular, since the result of such combinations would be an even stronger competitor that has access to a cable company's ubiquitous network, the Commission must make clear that the combined company would no longer have any legal entitlement to unbundled network elements (UNEs) from incumbent local exchange carriers (ILECs) pursuant to Section 251(c) of the Act.

I. USTelecom Agrees That the Broadband Marketplace in which NCTA is Seeking Relief is Highly Competitive and That Unnecessary Regulations Can Discourage Investment in Broadband Networks.

USTelecom does not oppose the forbearance relief requested by NCTA.[2] ILECs, CLECs, wireless and cable companies are all competing vigorously in the provision of voice, video and data services to both household and business consumers. Or, to be more accurate, all of these companies and others are competing to offer consumers all of these services over broadband facilities.

[2] USTelecom notes that NCTA asserts that its request falls within the scope of the Commission's forbearance authority pursuant to § 10 of the Act because it is seeking relief on behalf of cable operators' CLEC divisions or affiliates that qualify as "telecommunications carriers," as required by the language of that section. NCTA Forbearance Petition at n. 3. Since the term "telecommunication carrier" is defined by the Act as "a provider of telecommunications services," 47 U.S.C. § 3(44), NCTA's forbearance petition appears to raise fact-specific questions that the Commission will need to address as to whether particular cable operators or their affiliates are offering telecommunications services.

To be clear, NCTA's petitions are about competition in the provision of broadband-based services, and cable companies continue to have the largest share of broadband customers in most geographic markets. But USTelecom agrees that there is sufficient competition among providers such that it no longer makes any sense for there to be artificial barriers to combinations between two broadband providers in a market other than those, such as the antitrust laws, that exist for all industries.[3] Accordingly, USTelecom does not oppose NCTA's request that the Commission eliminate the processes established by Section 652, so long as it does so in a way that treats all service providers equally—that is, the Commission should eliminate artificial barriers to any combinations between cable companies, CLECs and/or ILECs that would not otherwise run afoul of the antitrust laws.[4]

II. Any Order Granting NCTA's Requested Relief Must Make Clear That a Combined Cable-CLEC Entity is Not Entitled to Purchase UNEs.

While USTelecom does not oppose the relief sought by NCTA in its forbearance petition,[5] it is essential that any order granting the requested relief clearly establish that a combined cable-CLEC is presumptively not entitled to purchase UNE facilities within the

[3] As NCTA points out, even if the obligations of Section 652 are eliminated, these transactions would continue to be subject to the Commission's review and approval pursuant to Section 214 of the Act. 47 U.S.C. §214.

[4] Section 652(d)(6) applies the same waiver procedures and standards to both the cable-CLEC transactions of subsection (b) and the cable-ILEC transactions of subsection (a).

[5] While USTelecom does not oppose NCTA's forbearance petition, it cannot support NCTA's petition for declaratory ruling as the legal argument asserted in that petition is facially flawed. In that petition, NCTA relies on assertions concerning legislative history and prior statements of the Commission's Cable Bureau as supportive of the idea that the intent of Section 652 was that its requirements only apply to combinations involving *incumbent* LECs, and not *competitive* LECs. Irrespective of the accuracy of those assertions, such considerations can only be relevant where there is ambiguity within the language of the statute itself. *See, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). And the Commission simply cannot ignore that the essential term for which NCTA's declaratory ruling petition seeks clarification—"local exchange carrier"—is a defined term within the Communications Act that includes "any" provider of telephone exchange service. 47 USC §3(26). Nor can it ignore the fact that Congress clearly delineated those instances where it meant for certain obligations to apply only to ILECs, and not to CLECs. *See* 47 USC §251. NCTA's arguments for declaratory ruling would, in effect, require the Commission to discern Congress' intent as to the scope of requirements each time the term "local exchange carrier" is used in the Act, despite it being a defined term.

franchise area of the acquiring cable company—including UNEs previously being purchased by the stand-alone CLEC.

In support of the public interest benefits of such transactions, NCTA emphasizes that cable-CLEC cross-ownership arrangements would provide CLECs with "access to cable networks [that] can reduce operational costs."[6] The American Cable Association (ACA) elaborates on this point by explaining that a key benefit of combinations between cable companies and CLECs would be to give "CLEC access to a cable network's facilities [that] can reduce the CLEC's operational costs" and that as a result, such combinations should "lead to the migration of the CLEC's services from leased to owned facilities and the expansion of cable services throughout business districts."[7]

Cable companies today have virtually ubiquitous networks within their franchise areas—including in business districts—as well as easy access to rights-of-ways for deploying additional network facilities. As noted previously, cable companies typically have the majority of consumer broadband customers within their franchise areas and have the dominant share of the video marketplace.

Moreover, NCTA's petitions fail to do justice to the tremendous success that cable companies have had in recent years in the small, medium and enterprise business markets. Last year, the three largest cable companies each had over $1 billion in business revenues. And industry-wide, cable companies' commercial services revenues—voice, data and video—are projected to grow from $5 billion in 2010 to $17 billion by 2014—even without CLEC

[6] NCTA Forbearance Petition at 8. It should be noted that COMPTEL expresses unqualified agreement with NCTA's forbearance analysis which includes the assertion that an *acquired CLEC will be benefitted by having reduced costs from being able to provide service over the acquiring cable-company's facilities*. COMPTEL Comments at 11.

[7] ACA Comments at 3.

acquisitions.[8] And while cable companies have historically focused on the small and medium-sized business markets (those companies with up to 500 employees), they are rapidly expanding their focus on and share of the enterprise market.[9] Indeed, according to one estimate, cable companies already control 25-30% of the U.S. Ethernet services business.[10]

For example, Cox Communications already has an estimated 25% of the small and medium-sized business market within its footprint[11] and has projected double-digit growth for each of the next several years.[12] Cablevision's dedicated business division, Optimum Lightpath, states that it has built the largest fiber network in the New York metropolitan area—*a network solely focused on serving business customers with more than 4,000 fiber-connected buildings*.[13] In fact, Cablevision claims to already serve more than 70% of the hospitals in portions of its New York footprint.[14] And Comcast has had year-over-year revenue growth rate of nearly 50% in *both* 2009 and 2010 for its commercial services and recently completed a roll-out of Ethernet

[8] Tim McElgunn, Pike & Fisher, *Cable Commercial Services Strategies: Analysis of Revenue Forecasts*, 3rd Edition, September 2010 at 18 ("Pike & Fisher Analysis").

[9] Heavy Reading Insider, *Cable Operators & Ethernet: Serious Business*, Vol.11, No. 5, July 2011 at 5 ("many larger regional enterprises increasingly view MSOs as potentially viable alternatives to incumbent carriers, after years of experience and market success.")

[10] Heavy Reading Insider at 24.

[11] Craig Moffett, Bernstein Research, *U.S. Cable & U.S. Telecom: Getting Down to Business…The Battle for Commercial Services and Wireless Backhaul*, September 8, 2010, at 4 ("Bernstein Research Analysis").

[12] Heavy Reading Insider at 16.

[13] Heavy Reading Insider at 19-20. Cablevision serves the small business market through its cable MSO, while its Optimum Lightpath unit is dedicated to providing complex managed services for medium and large business customers.

[14] *Id*.

services across its entire footprint for the purpose of delivering business-class services; while Time Warner Cable projects annual growth of more than 20% in the business services market.[15]

Moreover, while it is no doubt true as NCTA asserts that some CLEC business models have struggled in the past, a number of these companies are strong and increasing their shares of the business market. For example, tw telecom, a national CLEC, increased revenue 6.8% for the first six months of 2011 compared to the same period in 2010; in fact, tw telecom's overall revenue has grown for each of the last 27 quarters.[16] Furthermore, in the first six months of 2011, tw telecom connected 1,081 new buildings directly to its network, bringing its total to 14,311 "on-net" buildings.[17] Similarly, Cogent and AboveNet increased U.S. revenues by 17.6% and 17.2%, respectively, in the first six months of 2011 compared to the same period in 2010.[18] And Integra Telecom, a western regional CLEC, initiated a $52 million expansion of its fiber network earlier this year, increasing its on-net buildings by 20% to 1,600 in the first six months of 2011 compared to year-end 2010.[19]

Of course, the fact that the business broadband market is much more competitive than their petitions might reflect actually argues in favor of the relief that NTCA is seeking. In such a competitive marketplace, it is not only unnecessary but potentially harmful to maintain artificial barriers to the efficient operation of the economy. And this consideration weighs particularly

[15] Bernstein Research Analysis at 1; Heavy Reading Insider at 14, 17.

[16] Tw telecom Inc., U.S. Securities and Exchange Commission Form 10-Q, Second Quarter 2011, pp. 25-26.

[17] *Id.*

[18] Cogent Communications Group, Inc., U.S. Securities Exchange Commission Form 10-Q, Second Quarter 2011 at p. 12 and AboveNet, Inc., U.S. Securities Exchange Commission Form 10-Q, Second Quarter 2011 at p. 29.

[19] Integra Press Release, "Integra Telecom Increases Number of Buildings on its Network by 20 Percent." July 25, 2011.

heavy when it comes to the broadband services market as such barriers skew competition and discourage investment in broadband network facilities—which are in turn a major driver of the U.S. economy as a whole.

In light of all this, as well as NCTA's own explanation of the benefits of CLEC-cable company combination in creating a stronger competitor than they already present alone, there can be little doubt that such a combined entity cannot be found to be "impaired" without access to UNEs, as required by the Act.[20] Indeed, the continued reliance of the combined company on UNEs would totally undermine the essential arguments put forth by NCTA in support of the public interest benefits of such combinations: the promotion of facilities-based competition.

NCTA suggests, without any supporting evidence, that cable companies were slower to deploy facilities in downtown business districts than in other parts of their footprint. The statistics noted above demonstrate that this is certainly not the case today. In any event, however, the public interest benefits relied upon in the petitions would be fundamentally undermined if the combined cable-CLEC company could continue to rely on below-cost access to the ILEC's network.

CONCLUSION

USTelecom agrees with the basic premise of NCTA's petitions that rules and regulations that artificially constrain facilities-based competition for the provision of broadband services are clearly contrary to the public interest, particularly in light of the highly-competitive nature of the broadband market. For that reason, we do not oppose the elimination of *all* of the

[20] 47 U.S.C. §251(d)(2). *See also, In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, FCC 04-290 (2005) (providing that impairment exists "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.").

cross-ownership provisions of Section 652 of the Act. But the same logic dictates that a cable company that acquires a CLEC within its franchise area not be allowed to continue to rely on UNEs—the classic case of synthetic competition—as to do so would in fact discourage the very facilities-based competition that NCTA cites as the public interest benefit of such transactions. Accordingly, it is important that the Commission clarify in any order addressing the merits of NCTA's petitions that such a cable company-CLEC combination would no longer be "impaired" without access to UNEs.

Respectfully submitted,

_____

Jonathan Banks
Glenn Reynolds

United States Telecom Association
607 14th Street, N.W., Suite 400
Washington, D.C. 20005
(202) 326-7271

September 21, 2011